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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-945

LUIS ROLANDO GARZA,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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LUIS ROLANDO GARZA,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

The Petitioner, Luis Rolando Garza, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered in this proceeding on September 17, 1975.

OPINION

The opinion of the Texas Court of Criminal Appeals on original submission of the cause and on motion for rehearing appears in the Appendix hereof.

JURISDICTION

The judgment of the Texas Court of Appeals was entered and delivered on September 17, 1975, a timely petition for rehearing was denied by order of the Texas

Court of Criminal Appeals on the 8th day of October, 1975. This petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether a statement made by the Prosecutrix, in a statutory rape case, that her father had told her, "If you let me have a punch or a shot, your pimples will go away just like your sister's did.", was admission of evidence of an extraneous offense. (See record, page 108, line 2).

2. Whether a direct question by the State's Attorney to the Prosecutrix that, "Alright. Gracie, at any time did your father ever tell you that he had sexual intercourse with your sister?", was seeking from the Prosecutrix, evidence of an extraneous offense. (See record, page 111, line 23).

3. Whether the State's Attorney may ask the Prosecutrix in relation to her Defendant Father, "Did he ever imply that he had sex with her?", in that the State was seeking evidence of an extraneous offense. (See record, page 112, line 11).

4. Whether the Court can allow into evidence implications of other sexual intercourse with the Prosecutrix' sister, by the Defendant Father, on a question asked by the State's Attorney as to prior sexual intercourse with the Prosecutrix. (Record, page 113, line 26 through page 114, line 17).

5. Whether an unsolicited statement by a Police Detective that the Prosecutrix' sister, "Appeared to be in a very depressed condition. There were times when I had to wait for her to answer my questions

because she seemed to have difficulty in getting herself together. In explaining the things that she told me her father had done with her.", was hearsay evidence and evidence of an extraneous offense. (See record, page 166, line 12).

6. Whether a question by the State's Attorney to the Defendant, Appellant, "Isn't it true, Mr. Garza, that you also had sexual intercourse with Georgina Garza?", was a direct question to the Defendant seeking evidence of an extraneous offense. (Record, page 342, line 10).

7. Whether the State's Attorney, in asking the Appellant on cross-examination, "Are you sleeping with your mother too?", is seeking evidence of an extraneous offense. (Record, page 340, line 16).

8. Whether the admission and acceptance into evidence of a feminine hygiene device not used in the commission of the crime, but admitted into evidence in a manner that is highly prejudicial to the Appellant, is violative of Defendant's due process. (Record, page 105, line 16).

9. Whether the admission into evidence of a Divorce Petition filed on the Appellant herein by his wife and the mother of the Prosecutrix herein was so highly prejudicial as to prevent a fair trial in this matter. (Record, beginning page 252, line 16).

10. Whether the presentation of a statement by the Prosecutrix in the presence of the jury, was so highly prejudicial as to render the Defendant incapable of receiving a fair and impartial trial and denying him of his due process of law. (Record, page 79, line 1).

11. Whether the indictment handed down in this matter was fundamentally in error in that the indict-

ment is not in compliance with Article 1183 of the Penal Code of the State of Texas, in that it is required, "Or the carnal knowledge of a female under the age of eighteen years other than the wife of the person with or without her consent and with or without the use of force, threat or fraud;", in that the indictment herein improperly states that Luis Rolando Garza did have carnal knowledge of, "a female then nd there under the age of seventeen years," the same not being in compliance with the aforementioned statute. (Record, page 3 for the Indictment, and Record, page 24 for the Charge to the Court).

12. Whether the indictment being in variance with the charge, renders the verdict void, in that the indictment states, "Carnal knowledge of a female under the age of seventeen years", and the charge states "Carnal knowledge of a female under the age of eighteen years." (Record, page 3 for Indictment, and page 24 for Charge).

13. Whether there was sufficient evidence to convict the Defendant of the charged crime.

14. Whether the admission into evidence of a number of accumulative errors prevented the Appellant herein from receiving a fair and impartial trial and amounts to a denial of due process herein.

STATEMENT OF THE CASE

The Appellant was charged by indictment (Record, page 3), with carnally knowing Graciela Garza, the said Graciela Garza then and there being the daughter of Maria Elena Garza, the Appellant's wife, and with making a ravish assault on Graciela Garza, a female then and there under the age of seventeen years. The evidence shows the Prosecutrix, Graciela Garza, is the

daughter of the Appellant, Luis Rolando Garza, and his wife, Maria Elena Garza.

On or about the 21st day of January, 1974, Graciela Garza approached her school counsellor, Mrs. Keller (Record, page 153), and exposed the story of incestuous relationship with her father, whereupon her mother was called to school to hear the story. Thereafter, the mother with Graciela and an older daughter, Georgina, sought consultation from an attorney, Homero Lopez, as to possible divorce proceedings and criminal liability. (Record, page 213). Thereafter, they were sent to the District Attorney's office and then to the Police Department (Record, page 214), where statements were given to Detective Adan Marks on the 22nd day of January, 1974. The Defendant thereafter went to trial on May 14, 1974 (Record, page 56), and a mistrial thereupon was declared on May 15, 1974. (Record, page 57). Defendant was again tried on June 11, 1974 (Record, page 57), and a mistrial declared on June 13, 1974. Thereafter, the Defendant was again retried for the third time on June 25, 1974 (Record, page 58), to the above charges, Defendant having entered a plea of not guilty, whereupon a guilty verdict was rendered on June 27, 1974 (Record, page 58), as to the statutory rape count only. Sentence was heard on July 29, 1974, and the Appellant was sentenced to ten years confinement, the maximum allowable under the statutes herein. (Record, page 42). Thereafter, timely notice of appeal was filed (Record, page 52), and affirmed by the Texas Court of Criminal Appeals on September 17, 1975, whereupon a Motion for Rehearing was denied on October 8, 1975.

The Federal questions presented in questions numbers 1 through 7 relate to the admission into evidence of extraneous offenses and by virtue of their admission

into evidence, denied the Appellant herein the right of due process and as such prevented the Appellant from having a fair and impartial trial. The Federal question raised in the 8th question presented herein related to admission into evidence of a feminine hygiene device which was not used in commission of the crime, and in its admission and acceptance, created a harmful and prejudicial attitude toward the Appellant, thus denying him of due process and a fair and impartial trial.

All of the above matters were raised at the trial level and again at the appellate level, all being held either as waived, exceptions or harmless.

The Federal question raised in prior question number 9 relates to the admission into evidence of a Divorce Petition filed by the Appellant's wife herein in the presence of the jury, and as such was highly prejudicial and denied the Appellant a fair and impartial trial. The same was not ruled on by the lower courts herein.

The Federal question raised in question number 10 related to the offering into evidence of a statement by the Prosecutrix in the presence of the jury, the same being so highly prejudicial that it denied the Defendant the right to a fair and impartial trial and denied him of his due process. The same has not been ruled upon by the lower courts herein.

The Federal question raised in questions 11 and 12 relate to a fundamental error in the indictment and a material variance between the charge and the indictment, in that the indictment seeks a conviction for an act not listed in the Penal Code, and that the charge varies from the age listed in the indictment, none of the lower courts having ruled on this matter, however,

the Appellant urges that the same is such a fundamental error that it has denied him the right to a fair trial and thus denied him due process of law.

The Federal question raised in prior question number 13 is to the sufficiency of evidence to convict the Defendant of the crime charged, the same not having been ruled on by the lower courts.

The Federal question raised in question number 14 was to the cumulative errors presented, and Defendant alleges they were so prevalent that they were tantamount to denial of due process of Defendant, Appellant herein. The same were not ruled on by the lower courts.

REASONS FOR GRANTING THE WRIT

While this case is important to the Petitioner, in that Luis Rolando Garza will have to serve the maximum term in the Texas Department of Corrections as allowable under the statute for this offense if the Writ is not granted, there are matters involved which are more important. First, the protection of the rights of other citizens is involved; and Second, the obedience of the States to the mandates of this Court is involved.

The first seven questions involve evidence of an extraneous offense and are as follows:

1. Whether a statement made by the Prosecutrix, in a statutory rape case, that her father had told her, "If you let me have a punch or a shot, your pimples will go away just like your sister's did.", was an admission of evidence of an extraneous offense. (See record, page 108, line no. 2).

2. Whether a direct question by the State's Attorney to the Prosecutrix that, "Alright. Gracie, at

any time did your father ever tell you that he had sexual intercourse with your sister?", was seeking from the Prosecutrix, evidence of an extraneous offense. (See record, page 111, line 23).

3. Whether the State's Attorney may ask the Prosecutrix in relation to her Defendant Father, "Did he ever imply that he had sex with her?", in that the State was seeking evidence of an extraneous offense. (See record, page 112, line 11).

4. Whether the Court can allow into evidence implications of other sexual intercourse with the Prosecutrix' sister, by the Defendant Father, on a question asked by the State's Attorney as to prior sexual intercourse with the Prosecutrix. (Record, page 113, line 36 through page 114, line 17).

5. Whether an unsolicited statement by a Police Detective that the Prosecutrix' sister, "Appeared to be in a very depressed condition. There were times when I had to wait for her to answer my questions because she seemed to have difficulty in getting herself together. In explaining the things she told me her father had done with her." was hearsay evidence and evidence of an extraneous offense. (See record, page 166, line 12).

6. Whether a question by the State's Attorney to the Defendant, Appellant, "Isn't it true, Mr. Garza, that you also had sexual intercourse with Georgina Garza?", was a direct question to the Defendant seeking evidence of an extraneous offense. (Record, page 342, line 10).

7. Whether the State's Attorney, in asking the Appellant on Cross-examination, "Are you sleeping with your mother too?", is seeking evidence of an extraneous offense. (Record, page 340, line 16).

As a general proposition, the prosecution cannot, in a criminal case, resort to any kind of evidence of a Defendant's evil character to establish a probability of his guilt. *Greer* v. *United States*, (1918) 245 U.S. 559, 62 L ed. 469, 38 S Ct. 209.

Hence it is not permissible to introduce evidence tending to show that the Defendant had committed criminal acts wholly apart from those with which he is charged.

On a trial for murder, evidence of robberies committed by the Defendant was held inadmissible for the identification of the Defendant or for any other purpose whatsoever, where these robberies were wholly apart from the inquiry as to the murder and the Defendant might have committed the robberies and yet have been innocent of the murder. The error of admitting such evidence was held not be be cured by the Judge's charge that the Defendants were not to be convicted because of the commission of such robberies. *Bard* v. *United States*, (1892) 142 U.S. 450, 35 L ed. 1077, 12 S Ct. 292.

On the other hand, evidence of acts similar to those charged is admissible for the purpose of showing guilty intent, purpose, design, or knowledge. *Wood* v. *United States*, (1842) 10 L ed. 987; *Williamson* v. *United States*, (1908) 207 U.S. 425, 52 L ed. 278, 28 S Ct. 163; and *Nye & Nissen* v. *United States*, (1949) 336 U.S. 613, 93 L ed. 752, 69 S Ct. 766.

Thus, testimony that the same course of conduct was going on long before the date of indictment, when it was alleged that the Defendants conspired to commit fraud against the United States is admissible on the trial under such indictment, even though the indictment charged that conspiracy not barred by the statute of

limitations was actionable. *Heike* v. *United States,* (1915) 227 U.S. 131, 57 L ed. 450, 33 S Ct. 226. The Court pointed out that the evidence was permissible to prove that the same course of conduct was entered on long before and kept up as long as the same went to show intent, purpose, design or knowledge. The same was not an element in the case at hand.

Thus the requirement of due process was held not to be denied in a prosecution of a husband for the murder of his wife upon whose life he had obtained life insurance in his favor, admitting testimony that he had murdered a former wife whose life was also insured in his favor, the State Court proceeding on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, knowledge and system. *Lisemba* v. *California,* (1941) 314 U.S. 219, 86 L ed. 166, 62 S Ct. 280.

A long line of Texas cases follow this apparent rule and recognize the logic herein, and specifically speak to the point in incestual relations cases and have ruled that other acts of incest or sexual relations with other parties are not admissible evidence because they generally don't have a tendency to show intent, design, and system, etc., and as such the immediate evidence in this matter should not have been allowed entered, and was to the prejudice and harm of the Defendant herein, and violates his right to a fair and impartial trial and equal protection of the law and has denied him of due process of the law.

In considering the violation of the Defendant's right to a fair trial and the complete denial of due process as guaranteed under the constitution, questions numbered 8, 9, and 10 deal with the introduction into evidence of objectionable matter which has tainted and prejudiced Defendant's rights to a fair trial.

It is the very nature and basis of the judicial system of this land and guaranteed by the Constitution of the United States and by the Constitution of the State of Texas that each defendant charged shall be guaranteed a fair trial by impartial jury and shall have the equal protection of the laws and due process of the laws as so guaranteed. There is a long list of cases speaking to the point that any violation of this due process which would deny any defendant of those rights is worthy of consideration by this Honorable Court and as such should grant this writ of certiorari to review the prejudice and bias which have been exhibited herein. The matters before this Court involve the introduction into evidence of a defendant's divorce petition filed by his wife in an incest case, and the attempted admission into evidence of the Prosecutrix' statement given to the Police by the State's Attorney and of other nonassociated items which tend to taint and prejudice this Defendant before the jury. In the interest of basic fairness and in accordance with the Fourteenth Amendment, the right to a fair trial has been guaranteed according to many cases, and we ask the Court for its due consideration in this matter, coupled with all of the prejudice contained herein and would therein cite the instant cases which regard such a guarantee.

In connection with requests for the granting of writs of certiorari as applied herein, and in regard to questions numbered 11 and 12, which show a discrepancy in the indictment to the State Statute and a discrepancy between the indictment and the charge, it is a fundamental rule that the Defendant be advised of the charges against which he is to defend himself. In *U. S.* v. *Hess*, 124 U.S. 483-486, 8 S Ct. 571, 31 L ed. 516, it was held, "that all material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective". There is a re-

quirement that notice of the specific charge be heard against the Defendant. In *Cole* v. *Arkansas,* 68 S Ct. 514, 333 U.S. 196, 92 L ed. 644, this requirement is tantamount to advising the Defendant of the charge against him. In *U. S.* v. *Cruikshank,* 92 U.S. 542, 23 L ed. 588, it became necessary to furnish the accused with a description of the offense against him so that he might be apprised of the charge and the nature of the same against which he is to defend himself. In *U. S.* v. *Debrow,* 346 U.S. 374, 74 S Ct. 113, 9 L ed. 72, it became necessary to set out with a degree of certainty to enable the Defendant to be able to prepare his defense.

It is incumbent upon the judicial system that a defendant be fully and fairly apprised of the nature of the charges brought against him so that he might avail himself of the necessary requirements with which to present an adequate defense. It is therefore, in all things asked that this Court grant a writ of certiorari in consideration of these above matters.

Conviction of criminal offenses without evidence as denial of due process of law, stated in question number 13, denies the Defendant of that valuable right to a fair trial.

Is the due process guarantee, stated in the Sixth Amendment of the Federal Constitution with respect to the federal government, or in the Fourteenth Amendment to the Federal Constitution with respect to the states, or in the State Constitution violated by a conviction for a crime following a prosecution in which the accused has not filed a plea of guilty, and in which the prosecution has introduced no evidence of the accused's guilt, that is, no evidence of a sufficiency that the accused has committed a crime, even if the crime was

actually committed by someone? The same is without reference to a "tainted evidence" case which involves something that would probably be worse than a "no evidence" matter.

The landmark case on this question of whether denial of due process of law inheres in the conviction for a crime at the conclusion of a trial in which the prosecution produced no evidence, either that the crime was committed or that the accused had committed it is, *Thompson* v. *Louisville,* (1960) 362 U.S. 199, 4 L ed. 2d 654, 80 S Ct. 624, 80 A.L.R. 2d 135. The facts present in that case were that the defendant was loitering in a restaurant without any visible means of support and convicted of disorderly conduct. In support of its conclusion that the defendant in the *Thompson* case was denied due process the Supreme Court cited a number of its earlier decisions, not all of which involve State criminal prosecutions. Appellant would further recall the Court's attention to *Thompson* v. *Florida,* 391 U.S. 596, 88 S Ct. 1713, 20 L ed. 2d 838 (1968) and *Gregory* v. *Chicago,* 394 U.S. 111, 89 S Ct. 946, 22 L ed. 2d 134 (1969), there, in a disorderly conduct offense involving a peaceful march, the Court further took into consideration the question of no evidence, or insufficiency of evidence and Appellant here asks that this Court take into consideration the insufficiency of evidence involved herein.

Referred to as directly supporting the proposition that it is a violation of due process to convict or punish a man without evidence of his guilt were the cases of *Yick Wo* v. *Hopkins,* (1886) 118 U.S. 356, 30 L ed. 220, 6 S Ct. 1064, involving the constitutionality of an ordinance regulating buildings in which laundry businesses might be conducted. The Court held the same

to be as constitutionally "intolerable" that one may be compelled to hold his life or the means of living at the mere will of another, and that the constitutional guarantees "do not mean to leave room for the play and action of purely personal and arbitrary powers". *Moore* v. *Dempsey*, (1923) 281 U.S. 86, 67 L ed. 543, 43 S Ct. 265, involving the question whether local prejudice so infected a state criminal prosecution that the conviction of the accused violated due process, in which the Court viewed mere mistakes of law in the course of the trial as not amounting to a departure from the due process of law, but said that constitutional rights are violated in the case of a state criminal prosecution in which "the whole proceeding was a mask".

This Honorable Court has stated that a state's control of the procedure in its Courts in criminal cases is subject to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific applicable provisions of the Federal Constitution, *Brown* v. *New Jersey*, (1899) 175 U.S. 172, 44 L ed. 119, 20 S Ct. 77. In short, prosecutions for crime must comport with the requirements of procedural due process, which amounts to a guarantee that there will be no deprivation of life, liberty or property by arbitrary methods to the extent that such methods involve the procedure by which the deprivation is effected. Stated differently, the rule is that the due process of law guaranteed by the Fourteenth Amendment requires one charged with a crime in a State Court to be tried according to the forms and modes prescribed by law in such cases, and assures that in every trial and proceeding is deprived of no right to which he is entitled, *Ker* v. *Illinois*, (1886) 119 U.S. 436, 30 L ed.

421, 7 S Ct. 225. Although the case at hand is not devoid of evidence in that the Prosecutrix, daughter of Appellant, states the act occurred, no other evidence leads toward such conclusion.

Under alleged question number 14, the Court is asked to look at cumulative error.

The Supreme Court has indicated that in cases involving the propriety and prejudicial effect of a prosecutor's courtroom statements, the Federal Appellate Court's review of State Court proceedings is the narrow one of due process, rather than the broader review applicable to prosecutions under the Federal Appellate Court's supervisory power over Federal Trial Courts.

Thus, in *Donnelly* v. *DeChristoforo*, (1974) 416 U.S. 637, 40 L ed. 2d 431, 94 S Ct. 1868, which involved Federal Habeas Corpus proceedings brought by a State prisoner alleging that a prosecutor's statements during a State Court trial violated the due process clause of the Fourteenth Amendment, the Court of Appeals held that theirs was the review of the narrower basis of due process and not on the broad exercise of the supervisory power that it was possessed with in regard to a Federal Trial Court, the Supreme Court stating that it regarded the Court of Appeals' observation as important since not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a failure to observe that fundamental fairness essential to the very concept of justice.

In consideration of this very concept of justice, it is material that all of the elements be taken into consideration in that two prior mistrials had occurred regarding this same Defendant and the same charge,

and that only after a trial filled with prejudice and denial of due process rights was a conviction obtained against the defendant, many elements being held as harmless error, or others being considered as waived. It is inevitable that the Supreme Court must consider cumulative error for a Defendant when it appears the entire basis of his trial is so tainted as to deny him of rights to a concept of justice which he so dearly clings. In prior cases considered by this Court, the "strength" of a case has often been considered as weighing against prejudicial factors or remarks made by the prosecutor. The case in hand can only be considered "weak" in that the date of the alleged incident can only be pinned between Christmas and New Year, and that it is only the daughter of the Appellant's word against the Defendant's word, and the doubt of the Defendant's wife that such occurred. In *Berger* v. *United States,* (1935) 295 U.S. 78, 79 L ed. 1314, 55 S Ct. 629, the government was reversed in that it was considered a "weak" case. Noting that appeals to passion and prejudice may so poison the minds of jurors in even a strong case the accused may be deprived of a fair trial, the Court said that each case necessarily turns on its own facts, and that where, as in the case at bar, the record shows that the prosecutor's statements and actions were continual throughout the trial and resulted in cumulative evidence of a proceeding dominated by passion and prejudice, as such the reversal of said conviction for violation of the due process of the Fourteenth Amendment as applied to the States would be warranted in the ends of justice.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

BENNIE E. RAY
Post Office Box 3565
Brownsville, Texas 78520
(512) 546-2222
Counsel for Petitioner

Dated: 12/31/75

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 1975, three copies of the petition for writ of certiorari were mailed, postage prepaid to the Honorable John L. Hill, Jr., Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711, Counsel for Respondent. I further certify that all parties required to be served have been served.

BENNIE E. RAY
Counsel for Petitioner

APPENDIX

I

1. *Vernon's Texas Codes Annotated—Penal*

Article 1183 (superceded January 1, 1974, by Article 2101).

> "Rape" is the carnal knowledge of a woman without her consent obtained by force, threats or fraud; or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without the use of force, threats or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her, knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of eighteen years other than the wife of the person with or without her consent, and with or without the use of force, threats or fraud; provided that if she is fifteen years of age or over the defendant may show in consent cases that she was not of previous chaste character as a defense.

2. *Vernon's Constitution of the State of Texas*

Article I, Section 10. "Rights of Accused in Criminal Prosecutions".

> In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself,

or by counsel or both, he shall be confronted by the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the Anti-trust laws of this state, the defendant in the state shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a Grand Jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in case of impeachment, and in cases arising in the Army or Navy, or in the Militia, when in actual service in time of war or public danger.

As amended November 5, 1918.

3. *The Constitution of the United States of America*

Amendment Number Five:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal cases to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment Number Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment Number 14, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

II

Notice From the Court of Criminal Appeals of Texas, Dated October 8, 1975.

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, Oct. 8, 1975

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the appellant's Motion for Rehearing in Cause No. 49,874, Luis Rolando Garza

vs.

THE STATE OF TEXAS, Appellee.

Sincerely yours,

GLENN HAYNES, Clerk

III

NO. 49,874

LUIS ROLANDO GARZA,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

Appeal from CAMERON County

Opinion

The offense was statutory rape; the punishment, ten years.

The prosecutrix was appellant's minor daughter.

Appellant's first four grounds of error complain of testimony by the prosecutrix upon direct examination relating to other acts of intercourse between the appellant and herself. Appellant contends that this testimony related the details of inadmissible extraneous offenses. In Williams v. State, 490 S.W.2d 604, we noted that since Johns v. State, 236 S.W.2d 820 was decided in 1951, the evidentiary rule is that in a trial for statutory rape the prosecutrix may testify as to other sexual acts between herself and the accused. The justification for the rule is fully set out and discussed in *Johns*, supra. The rule has been uniformly followed. E.g., Gephart v. State, 249 S.W.2d 612; Simons v. State, 317 S.W.2d 740; Smotherman v. State, 455 S.W.2d 285.

Appellant, without refuting the applicability of the above discussed rule, apparently contends that its scope was exceeded. During the prosecutrix's detailing of prior acts, she repeated several statements made to her

during such acts by the appellant.[1] The statements implied that the appellant had also had intercourse with another minor daughter, the sister of the prosecutrix.

The testimony of the prosecutrix as to these statements was not admitted as evidence of extraneous offenses because the testimony was not received to prove that the acts implied had actually been committed. The statements were not hearsay for the same reason. They were, rather, merely details pertaining to the circumstances of the prior acts, evidence of which was admissible. What the appellant said to the prosecutrix during those acts is as admissible as any other circumstance of the prior acts. See Lamberson v. State, 504 S.W.2d 894; Holcomb v. State, 484 S.W.2d 938, cert. denied, 410 U.S. 940, 93 S.Ct. 1404; Hemphill v. State, 467 S.W.2d 412; Fields v. State, 402 S.W.2d 740.

The jury could not draw a prejudicial inference from the statements unless it believed the prosecutrix's assertion that the appellant uttered them during prior acts of intercourse. The prior acts were relevant to the central issue of intercourse upon a particular occasion. The jury's belief that the statements had been made could be no more damaging to the appellant than their belief that the prior acts of intercourse had occurred. The statements could, nevertheless, be relevant to whether the prior acts had occurred. Therefore they were admissible for that reason.

The first four grounds of error are overruled.

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1. The prosecutrix testified: "He said, 'If you let me have a "punch" or a "shot" your pimples will go away just like your sister's did.' . . . He said, if I let him have sex with me that it would work just as well on me as it did on my sister; that I would get smart just like my sister."

In his fifth ground of error, appellant complains that when a police officer at trial was asked about the appearance of the prosecutrix's sister when she met him in his office, he replied that the girl "seemed to have difficulty in getting herself together . . . [i]n explaining the things that she told me that her father had done with her." Appellant's objection was sustained and his motion for the jury to disregard the last part of the testimony was granted, but his motion for a mistrial was denied. In view of the vagueness of the statement and the promptness of the instruction to disregard, we cannot conclude that any prejudicial impact was indelibly implanted upon the mind of the jury. Warren v. State, 514 S.W.2d 458, 463; Bolden v. State, 504 S.W.2d 418; Ortiz v. State, 490 S.W.2d 594; Hopkins v. State, 480 S.W.2d 212. The relief granted was sufficient. Appellant's fifth ground of error is overruled.

In his sixth ground of error, appellant contends that his conviction should be reversed because the State asked him upon cross-examination whether he had ever had intercourse with a minor daughter other than the prosecutrix. The seventh ground of error is similar in that appellant therein complains of the prosecutor's question whether he was sleeping with his mother. After each question the appellant promptly answered in the negative.

The former question was without proper foundation where first, there was no direct evidence that such intercourse had occurred; and second, the State failed at any time to call the prosecutrix's sister to testify. Having been unable or unwilling to undertake the steps necessary to render admissible evidence of any extraneous offense, the prosecutor should not imply by in-

nuendo the existence of such an offense. This was the effect of asking the question in the form, "Isn't it true that . . .?"

However, the question was asked only once and was answered emphatically in the negative. We are aware that a negative answer to a prejudicial question does not always render the error harmless. Sensabaugh v. State, 426 S.W.2d 224; McNaulty v. State, 135 S.W.2d 987; Lamm v. State, 252 S.W. 535. But it is also true that a prejudicial question will not always mandate overturning a conviction, especially if the answer is helpful to the accused. Wallace v. State, 501 S.W.2d 883; Rice v. State, 480 S.W.2d 694; Mahaffey v. State, 471 S.W.2d 801, cert. denied, 405 U.S. 1018, 92 S.Ct. 1297.

The emphasis of the question as to appellant's mother, raised in the seventh ground of error, is slightly different. The question was wholly without any basis whatsoever and therefore was apparently asked in bad faith.[2] However, the phrasing of the question did not imply any independent knowledge, but was more in the nature of a sarcastic remark than a question. As such it is not to be condoned and has no place in a trial. Nevertheless, no reversible error is shown and the sixth and seventh grounds of error are overruled.

In his eighth ground of error, appellant contends that the court reversibly erred by admitting into evidence an apparatus similar to one appellant had allegedly used upon prosecutrix during a sexual act prior to that for which he was on trial. The apparatus, ap-

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2. The State in its brief contends as follows: "After all, if one is so perverted that he sleeps with his own daughter, he might also sleep with his mother." The contention is ludicrous.

parently a hygiene device, was a tubular container with an attached hose or nozzle. A proper predicate was laid for the admission of the device and prosecutrix testified that it was similar to that which appellant had used upon her person.

We have explained above that in a trial for statutory rape the prosecutrix may testify as to the details of prior sexual acts involving herself and the defendant. Smotherman v. State, 455 S.W.2d 285; Simons v. State, 317 S.W.2d 740. If such testimony may be received, then it makes little sense to say that evidence of prior acts may not also be received.

The object merely lent tangible reality to the words of the prosecutrix. Hence, its introduction into evidence was within the discretion of the trial judge. Cf. Atkins v. State, 515 S.W.2d 904; Cunningham v. State, 500 S.W.2d 820.

Appellant's ninth ground of error contends it was error to accept the jury's verdict because the jury signers thereof did not conform to the list of jurors chosen.

The error in the jury list prepared by the Clerk is an obvious typographical error in that one juror's name was typed twice and another's was omitted entirely. Because the verdict was ultimately returned by a jury of eleven (see Art. 36.29, V.A.C.C.P.), the record reflects that all jurors' names appear correctly in both the verdict and the judgment of conviction. Moreover, the jurors were polled after the verdict was rendered. Finally, appellant raised no objection upon this

point prior to the filing of his brief upon appeal. No error is shown. See Ainsworth v. State, 517 S.W. 2d 274.

The judgment is affirmed.

PER CURIAM

(Delivered September 17, 1975).